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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KRISTEN ALICIA DALE,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,¹

Defendant.

Case No.: 16-cv-2618-W (RNB)

**REPORT AND
RECOMMENDATION REGARDING
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

(ECF NOS. 16, 19)

This Report and Recommendation is submitted to the Honorable Thomas J. Whelan, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1) and Civil Local Rule 72.1(c).

On October 20, 2016, plaintiff Kristen Alicia Dale filed a Complaint pursuant to 42 U.S.C. § 405(g) seeking judicial review of a decision by the Commissioner of Social Security denying her applications for a period of disability and disability insurance benefits and for Supplemental Security Income benefits. (ECF No. 1.)

¹ Nancy A. Berryhill is hereby substituted as the defendant in this case per Fed. R. Civ. P. 25(d).

1 Now pending before the Court and ready for decision are the parties' cross-motions
2 for summary judgment. For the reasons set forth herein, the Court **RECOMMENDS** that
3 plaintiff's motion for summary judgment be **GRANTED**, that the Commissioner's cross-
4 motion for summary judgment be **DENIED**, and that Judgment be entered reversing the
5 decision of the Commissioner and remanding this matter for further administrative
6 proceedings.

7 8 **I. PROCEDURAL BACKGROUND**

9 On October 25, 2012, plaintiff filed applications for a period of disability and
10 disability insurance benefits and for Supplemental Security Income benefits, alleging
11 disability beginning on January 4, 2004 due to back problems, depression, anxiety, alcohol
12 dependence, alcoholic hepatitis, and liver cirrhosis. (Administrative Record ("AR") 207-
13 08, 294-306.) After her applications were denied initially and upon reconsideration (AR
14 208, 225), plaintiff requested an administrative hearing before an administrative law judge
15 ("ALJ"). (AR 227-32.) An administrative hearing was held on November 17, 2014.
16 Plaintiff appeared at the hearing with counsel, and testimony was taken from her, two
17 medical experts, and a vocational expert. (AR 75-124.)

18 As reflected in her March 30, 2015 hearing decision, the ALJ rendered a partially
19 favorable decision, finding plaintiff disabled as of June 1, 2013. (AR 56-67.) The ALJ's
20 decision became the final decision of the Commissioner on August 16, 2016, when the
21 Appeals Council denied plaintiff's request for review. (AR 3-7.) This timely civil action
22 followed.

23 24 **II. SUMMARY OF THE ALJ'S FINDINGS**

25 In rendering her decision, the ALJ followed the Commissioner's five-step sequential
26 evaluation process. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, the ALJ found that
27 plaintiff had not engaged in substantial gainful activity since the alleged onset date, January
28 4, 2004. (AR 58.)

1 At step two, the ALJ found that plaintiff had the following severe impairments:
2 “chronic pain syndrome secondary to degenerative disc disease of the lumbar spine, status-
3 post L5-S1 fusion surgery in September 2005 and failed back surgery syndrome; major
4 depressive disorder; a history of alcohol/opiate dependence; post-traumatic stress disorder
5 (PTSD); and panic disorder with agoraphobia.” (AR 59.) The ALJ found that plaintiff’s
6 impairments caused significant limitations to her ability to perform basic work activities.
7 (*Id.*)

8 At step three, the ALJ found that plaintiff did not have an impairment or combination
9 of impairments that met or medically equaled one of the impairments listed in the
10 Commissioner’s Listing of Impairments. (AR 59.)

11 Next, the ALJ determined that “[p]rior to June 1, 2013, [plaintiff] had the residual
12 functional capacity² to perform sedentary work as defined in 20 CFR 404.1567(a) and
13 416.967(a) except lifting no more than 10 pounds frequently; never climbing
14 ladders/ropes/scaffolds; no more than occasional stooping, kneeling, crouching, balancing,
15 crawling, or climbing stairs/ramps; and no unprotected heights or hazardous machinery.
16 The [plaintiff] is further limited to understanding, remembering, and carrying out no more
17 than simple, 1-2 step job instructions (SVP 2 and below) with no in-person interaction with
18 the public, but telephone interaction is not limited.” (AR 60.) However, beginning on June
19 1, 2013, plaintiff had the additional limitations of “be[ing] off-task 20% of the workday
20 and [missing] 2-4 days per month due to worsening mental health issues and decreased
21 concentration issues related to pain and side effects from pain medication.” (AR 63.)

22 The ALJ then proceeded to step four of the sequential evaluation process. At this
23 step, the ALJ found that plaintiff was unable to perform any of her past relevant work. (AR
24 64.) For purposes of his step five determination, the ALJ adduced and accepted the
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27 ² Residual functional capacity (“RFC”) is the most an individual can do despite his or her
28 limitations. *See* 20 C.F.R. §§ 404.1545(a), 416.945(a).

1 testimony of a vocation expert (VE) that, prior to June 1, 2013, an individual with plaintiff's
2 vocational profile and RFC could perform the following unskilled jobs that existed in
3 significant numbers in the national economy: document preparer (DOT³ 204.587-018);
4 ticket counter (DOT 219.587-010); and zipper trimmer (DOT 734.687-094). (AR 65-66.)
5 However, with plaintiff's additional limitations beginning on June 1, 2013, there were no
6 jobs that an individual with plaintiff's vocational profile and RFC could perform beginning
7 on that date. (AR 66.)
8

9 **III. SOLE ISSUE IN DISPUTE**

10 The sole issue in dispute in this case is whether the ALJ committed legal error at
11 step five of the sequential evaluation process. Specifically, plaintiff contends that the ALJ
12 erred in accepting the VE's testimony that an individual with plaintiff's vocational profile
13 and RFC could perform the three jobs identified by the VE. According to plaintiff, the
14 reasoning levels required for those jobs according to the DOT conflict with the ALJ's
15 finding that plaintiff was limited to understanding, remembering, and carrying out no more
16 than simple, 1-2 step job instructions, and the ALJ erred when she failed to question the
17 VE about this conflict. (*See* ECF No. 16-1 at 6-9.) In response, the Commissioner
18 implicitly concedes that the ALJ erred in accepting the VE's testimony, but argues that the
19 error was harmless with respect to the zipper trimmer job. (ECF No. 19-1 at 5-8.)⁴
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23 ³ "DOT" refers to the Dictionary of Occupational Titles.
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25 ⁴ With respect to the other two jobs identified by the VE (document preparer and ticket
26 counter), the Commissioner does not dispute that the ALJ erred or argue that the ALJ's
27 error was harmless. While the Court concurs with the Commissioner that there are a
28 sufficient number of zipper trimmer jobs in the San Diego region and nationally to meet
the Commissioner's burden at step five, the Court disagrees with the Commissioner that
the ALJ's step five error with respect to the zipper trimmer job was harmless.

1 IV. STANDARD OF REVIEW

2 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to
3 determine whether the Commissioner's findings are supported by substantial evidence and
4 whether the proper legal standards were applied. *DeLorme v. Sullivan*, 924 F.2d 841, 846
5 (9th Cir. 1991). Substantial evidence means "more than a mere scintilla" but less than a
6 preponderance. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d
7 842 (1971); *Desrosiers v. Secretary of Health & Human Servs.*, 846 F.2d 573, 575-76 (9th
8 Cir. 1988). Substantial evidence is "such relevant evidence as a reasonable mind might
9 accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 401. This Court
10 must review the record as a whole and consider adverse as well as supporting evidence.
11 *Green v. Heckler*, 803 F.2d 528, 529-30 (9th Cir. 1986). Where evidence is susceptible of
12 more than one rational interpretation, the Commissioner's decision must be upheld.
13 *Gallant v. Heckler*, 753 F.2d 1450, 1452 (9th Cir. 1984).

14 V. DISCUSSION

15 A. The ALJ's burden to reconcile conflicts between the VE's testimony 16 and the DOT 17

18 At step five of the sequential evaluation process, the Commissioner has the burden
19 "to identify specific jobs existing in substantial numbers in the national economy that [a]
20 claimant can perform despite [his] identified limitations." *Zavalin v. Colvin*, 778 F.3d 842,
21 845 (9th Cir. 2015) (alterations in original) (quoting *Johnson v. Shalala*, 60 F.3d 1428,
22 1432 (9th Cir. 1995)) (citing 20 C.F.R. § 416.920(g)). In making a disability determination
23 at this step, the ALJ relies primarily on the DOT for "information about the requirements
24 of work in the national economy." *Massachi v. Astrue*, 486 F.3d 1149, 1153 (9th Cir.
25 2007). "The DOT describes the requirements for each listed occupation, including the
26 necessary General Education Development ('GED') levels; that is, 'aspects of education
27 (formal and informal) . . . required of the worker for satisfactory job performance.'" *Zavalin*,
28 778 F.3d at 846 (quoting DOT, App. C, 1991 WL 688702 (4th ed. 1991)). "The

1 GED levels [include] the reasoning ability required to perform the job, ranging from Level
2 1 (which requires the least reasoning ability) to Level 6 (which requires the most).” *Id.*
3 (citing DOT, App. C, 1991 WL 688702).

4 In addition to the DOT, the ALJ “uses testimony from vocational experts to obtain
5 occupational evidence.” *Massachi*, 486 F.3d at 1153; *see also Zavalin*, 778 F.3d at 846.
6 Generally, the VE’s testimony should be consistent with the DOT. *See Social Security*
7 *Ruling (“SSR”)*⁵ 00-4p, 2000 WL 1898704, at *2 (Dec. 4, 2000); *Massachi*, 486 F.3d at
8 1153. But when conflicts occur, neither the DOT nor the VE’s evidence automatically
9 trumps. *Massachi*, 486 F.3d at 1153 (citing SSR 00-4p at *2). “Thus, the ALJ must first
10 determine whether a conflict exists.” *Id.*

11 “When there is an apparent conflict between the vocational expert’s testimony and
12 the DOT—for example, expert testimony that a claimant can perform an occupation
13 involving DOT requirements that appear more than the claimant can handle—the ALJ is
14 required to reconcile the inconsistency.” *Zavalin*, 778 F.3d at 846 (citing *Massachi*, 486
15 F.3d at 1153-54). The ALJ must ask the VE whether his or her testimony conflicts with
16 the DOT. *Massachi*, 486 F.3d at 1153-54; SSR 00-4p at *4. If it does conflict, “the ALJ
17 must then determine whether the vocational expert’s explanation for the conflict is
18 reasonable and whether a basis exists for relying on the expert rather than the [DOT].” *Id.*
19 at 1153. A failure to ask the VE whether his or her testimony conflicts with the DOT may
20 be harmless error if there is no conflict, or if the VE provides “sufficient support for [his
21 or] her conclusion so as to justify any potential conflicts.” *Id.* at 1154, n.19; *see also Hann*
22 *v. Colvin*, No. 12-cv-06234, 2014 WL 1382063, at *15 (N.D. Cal. Mar. 28, 2014).

26 ⁵ “SSRs reflect the official interpretation of the [Social Security Administration] and are
27 entitled to ‘some deference’ as long as they are consistent with the Social Security Act and
28 regulations.” *Avenetti v. Barnhart*, 456 F.3d 1122, 1124 (9th Cir. 2006) (quoting *Ukolov*,
420 F.3d at 1005 n.2).

1 2. Analysis

2 The DOT identifies the occupation of zipper trimmer as requiring a reasoning level
3 of 2. *See* DOT 734.687-094, *available at* 1991 WL 679969. The DOT defines Reasoning
4 Level Two as follows: “Apply commonsense understanding to carry out detailed but
5 uninvolved written or oral instructions. Deal with problems involving a few concrete
6 variables in or from standardized situations.” APPENDIX C - COMPONENTS OF THE
7 DEFINITION TRAILER, 1991 WL 688702. By way of contrast, the DOT defines
8 Reasoning Level One as follows: “Apply commonsense understanding to carry out simple
9 one- or two-step instructions. Deal with standardized situations with occasional or no
10 variables in or from this situations encountered on the job.” *Id.*

11 In *Rounds v. Comm’r Social Sec. Admin.*, 807 F.3d 996 (9th Cir. 2015), the Ninth
12 Circuit held that an apparent conflict exists between an RFC that limits a person to one-
13 and two-step tasks and the demands of Level Two reasoning, which requires a person to
14 “carry out detailed but uninvolved written or oral instructions.” *Rounds*, 807 F.3d at 1003
15 (“Only tasks with more than one or two steps would require ‘detailed’ instructions.”); *see*
16 *also Tester v. Colvin*, 624 F. App’x 485, 487-88 (9th Cir. 2015) (finding that the plaintiff’s
17 RFC for “simple, 1-2 step work” is in apparent conflict with Reasoning Level Two). In
18 making this determination, the Ninth Circuit relied on the close similarity in language
19 between reasoning level one, which includes the limitation to carrying out “simple one- or
20 two-step instructions,” and the plaintiff’s RFC limitation to “one to two step tasks.”
21 *Rounds*, 807 F.3d at 1003.

22 Based on the reasoning of *Rounds*, the Court finds that there was an apparent conflict
23 between the VE’s testimony that an individual with plaintiff’s vocational profile and RFC
24 could perform the zipper trimmer job and the DOT, which the ALJ failed to address.
25 Similar to *Rounds*, “[b]ecause the ALJ did not recognize the apparent conflict between
26 [plaintiff’s] RFC and the demands of Level Two reasoning, the VE did not address whether
27 the conflict could be resolved.” *Rounds*, 807 F.3d at 1004. As a result, the Court is unable
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1 to determine whether substantial evidence supports the ALJ's step five finding with respect
2 to the zipper trimmer job.

3 In *Rounds*, the Ninth Circuit also found that the ALJ's failure to reconcile this
4 apparent conflict was not harmless. It reasoned as follows:

5 "In his RFC assessment, the ALJ did not merely restrict Rounds to 'simple'
6 or 'repetitive' tasks. Instead, he expressly limited her to 'one to two step
7 tasks,' apparently to address her 'moderate' problems with memory and
8 concentration. There is no explanation in the record as to why the VE or the
9 ALJ may have believed that Rounds' specific limitation to "one to two step
10 tasks" should not be taken at face value. As such, the record does not support
11 a conclusion that the ALJ's failure to resolve this apparent conflict was
12 harmless error. This Court "cannot affirm the decision of an agency on a
13 ground that the agency did not invoke in making its decision." *Zavalin*, 778
14 F.3d at 848 (*quoting Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054
15 (9th Cir.2006)) (holding that ALJ's failure to reconcile apparent conflict
16 between RFC and DOT was not harmless error)." *Rounds*, 807 F.3d at 1004.

17 The Ninth Circuit's rationale for rejecting the Commissioner's harmless error
18 argument in *Rounds* applies with equal force here. The Court therefore recommends that
19 this case be remanded for further proceedings to enable the ALJ to determine (a) whether
20 there is a reasonable explanation to justify relying on the VE's previous testimony and/or
21 (b) whether the VE is able to identify other jobs that require level one reasoning and are
22 suitable for someone with plaintiff's limitations prior to June 1, 2013. *See Rounds*, 807
23 F.3d at 1004 & n.5; *see also Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012); *Benecke*
24 *v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004).

25 VI. CONCLUSION AND RECOMMENDATION

26 For the foregoing reasons, this Court **RECOMMENDS** that plaintiff's motion for
27 summary judgment be **GRANTED**, that the Commissioner's cross-motion for summary
28 judgment be **DENIED**, and that Judgment be entered reversing the decision of the
Commissioner and remanding this matter for further administrative proceedings.

Any party having objections to the Court's proposed findings and recommendations shall serve and file specific written objections within 14 days after being served with a copy of this Report and Recommendation. *See* Fed. R. Civ. P. 72(b)(2). The objections should be captioned "Objections to Report and Recommendation." A party may respond to the other party's objections within 14 days after being served with a copy of the objections. *See* Fed. R. Civ. P. 72(b)(2). *See id.*

Dated: April 5, 2018



ROBERT N. BLOCK
UNITED STATES MAGISTRATE JUDGE